

1 belonged to the relevant category of persons barred from possessing
2 a firearm." *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019).
3 On the basis of *Rehaif* and the government's failure to charge or
4 prove his knowledge of status, Mitchell now moves to vacate his
5 conviction.

6 Pursuant to 28 U.S.C. § 2255, a federal inmate may move to
7 vacate, set aside, or correct his sentence if: (1) the sentence
8 was imposed in violation of the Constitution or laws of the United
9 States; (2) the court was without jurisdiction to impose the
10 sentence; (3) the sentence was in excess of the maximum authorized
11 by law; or (4) the sentence is otherwise subject to collateral
12 attack. *Id.* § 2255(a).

13 Mitchell argues that the omission of the *Rehaif* element from
14 the indictment violated his Fifth Amendment rights guaranteeing
15 that a grand jury find probable cause to support all the necessary
16 elements of the crime and his Sixth Amendment rights to notice of
17 the charges and effective assistance of counsel.¹ He also alleges
18 that the defective indictment deprived the court of jurisdiction.
19 The government asserts that Mitchell has waived his right to bring
20 these claims, that his claims are procedurally defaulted, and that
21 the government is not required to prove the defendant knew his
22 possession of firearms was unlawful.

23 As part of his plea, Mitchell "waive[d] all collateral
24 challenges, including any claims under 28 U.S.C. § 2255, to his
25 conviction, sentence, and the procedure by which the Court

26 ¹ In his reply, Mitchell clarifies that he is not asserting an
27 independent claim of ineffective assistance of counsel claim but,
28 rather, that he asserts a Sixth Amendment violation to show that
the *Rehaif* omission caused him prejudice.

1 adjudicated guilt and imposed sentence, except non-waivable claims
2 of ineffective assistance of counsel." (ECF No. 22 at 11). Such
3 "[a]n unconditional guilty plea waives all non-jurisdictional
4 defenses and cures all antecedent constitutional defects, allowing
5 only an attack on the voluntary and intelligent character of the
6 plea." *United States v. Brizan*, 709 F.3d 864, 866-67 (9th Cir.
7 2013); see also *Tollett v. Henderson*, 411 U.S. 258, 267 (1973);
8 *United States v. Espinoza*, 816 Fed. App'x 82, 85 (9th Cir. June 1,
9 2020) (unpublished disposition) (unconditional plea waiver
10 precludes all Fifth and Sixth Amendment claims except to the extent
11 they contest the court's jurisdiction or the voluntariness of the
12 plea). Thus, except to the extent Mitchell attacks the jurisdiction
13 of the court, his claims are waived.²

14 Mitchell's jurisdictional argument is without merit. The
15 omission of an element from the indictment does not affect the
16 court's jurisdiction. *United States v. Cotton*, 535 U.S. 625, 630
17 (2002); *United States v. Ratigan*, 351 F.3d 957, 962-63 (9th Cir.
18 2003); see also *United States v. Burleson*, 2020 WL 4218317, at *1
19 (July 23, 2020) (unpublished disposition) (rejecting the
20 defendant's argument that omission of the *Rehaif* element deprived
21 the district court of jurisdiction); *Espinoza*, 2020 WL 2844542, at
22 *1 (same); *United States v. Moore*, 954 F.3d 1322, 1332 (11th Cir.
23 2020); *United States v. Hobbs*, 953 F.3d 853, 856 (6th Cir. 2020);
24 *United States v. Balde*, 943 F.3d 73, 88-92 (2d Cir. 2019); *United*
25 *States v. Burghardt*, 939 F.3d 397, 402 (1st Cir. 2019). *Cf. United*

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27 ² The court agrees with the well-reasoned opinions of several
28 courts that none of the exceptions under *Tollett* to the plea waiver
applies in this case. See, e.g., *United States v. Kelbch*, 2021 WL
96242, at *2 (D. Nev. Jan. 7, 2021).

1 *States v. Singh*, 979 F.3d 697, 730 (9th Cir. 2020) (on direct
2 appeal, reviewing omission of *Rehaif* element from indictment for
3 plain error).

4 Moreover, Mitchell's Fifth and Sixth Amendment claims are
5 procedurally defaulted, even assuming, as Mitchell argues, that
6 they could be considered jurisdictional in nature.

7 "If a criminal defendant could have raised a claim of error
8 on direct appeal but nonetheless failed to do so, he must
9 demonstrate" either "cause excusing his procedural default, and
10 actual prejudice resulting from the claim of error," *United States*
11 *v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993), or that he is
12 actually innocent of the offense, *Bousley v. United States*, 523
13 U.S. 614, 622 (1998). "[C]ause for a procedural default on appeal
14 ordinarily requires a showing of some external impediment
15 preventing counsel from constructing or raising the claim." *Murray*
16 *v. Carrier*, 477 U.S. 478, 492 (1986). Actual prejudice "requires
17 the petitioner to establish 'not merely that the errors at ...
18 trial created a possibility of prejudice, but that they worked to
19 his actual and substantial disadvantage, infecting his entire
20 trial with error of constitutional dimensions.'" *Bradford v.*
21 *Davis*, 923 F.3d 599, 613 (9th Cir. 2019) (internal citation
22 omitted).

23 Mitchell could have raised his claims on direct appeal but
24 did not do so. They are therefore procedurally defaulted. It is
25 unnecessary to resolve whether Mitchell can demonstrate cause for
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1 the default, because even if he could, he cannot demonstrate
2 prejudice.³

3 Mitchell committed the instant offense less than six months
4 after his conviction for first degree burglary, a felony. (PSR ¶¶
5 8-13, 39). In addition, Mitchell had shortly before that been
6 convicted of a crime that required as an element a prior felony
7 conviction. (PSR ¶ 38). Mitchell acknowledged in his plea agreement
8 that he had been previously convicted of a felony. (ECF No. 22 at
9 4-5). And finally, and most importantly, he acknowledged during
10 his plea colloquy both that he had a prior felony conviction for
11 first degree burglary and that he was aware at the time of his
12 offense that he was not allowed to possess a firearm. In light of
13 Mitchell's admissions that he knew he was a convicted felon and
14 that he was prohibited from possessing firearms, combined with his
15 criminal history, the court is not persuaded that the outcome of
16 the proceedings would have been any different had the grand jury
17 been presented with, and the indictment had alleged, the *Rehaif*
18 element.

19 Mitchell argues that he suffered prejudice because he was
20 convicted by a court lacking jurisdiction. For the reasons
21 previously discussed, this argument is without merit because the
22 errors Mitchell complains of did not deprive the court of
23 jurisdiction. Mitchell also asserts prejudice on the basis that
24 the omission deprived him of effective assistance of counsel. For
25 the reasons just discussed, there is no support for Mitchell's
26 argument that the outcome of the proceedings would have been

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28 ³ Mitchell does not argue actual innocence.

1 different if the *Rehaif* element had been alleged. Mitchell has not
2 therefore proven deprivation of counsel.

3 Mitchell alternatively argues that he is not required to
4 demonstrate prejudice to obtain relief because the omission is
5 structural error.

6 "[C]ertain errors, termed structural errors, might affect
7 substantial rights regardless of their actual impact on an
8 appellant's trial." *United States v. Marcus*, 560 U.S. 258, 263
9 (2010) (internal punctuation and citations omitted). Thus,
10 structural error "warrant[s] habeas relief without a showing of
11 specific prejudice." *United States v. Withers*, 638 F.3d 1055, 1063-
12 64 (9th Cir. 2011). "But structural errors are a very limited class
13 of errors that affect the framework within which the trial
14 proceeds, such that it is often difficult to assess the effect of
15 the error." *Marcus*, 560 U.S. at 263 (internal punctuation and
16 citations omitted). Cases in which the Supreme Court has found
17 structural error include total deprivation of counsel, lack of an
18 impartial trial judge, violation of the right to a public trial
19 and an erroneous reasonable-doubt instruction. See *id.* (discussing
20 cases). In contrast, errors that have been found to be non-
21 structural include where the court instructed on an invalid
22 alternative theory of guilt, gave an instruction omitting an
23 element of the offense, or erroneously instructed the jury on an
24 element. *Id.* at 264 (discussing cases).

25 The Ninth Circuit has not yet addressed in a published opinion
26 whether omission of the *Rehaif* element from the indictment is
27 structural error. But it has held that the error is not structural
28 in at least one unpublished decision. See *United States v. Jackson*,

2020 WL 7624842, at *1 n.1 (9th Cir. Dec. 22, 2020). And the Third, Fifth, Seventh, Eighth, and Tenth Circuits have concluded the error is not structural. *United States v. Nasir*, -- F.3d. --, 2020 WL 7041357, at *19, n.30 (3d Cir. Dec. 1, 2020); *United States v. Coleman*, 961 F.3d 1024, 1030 (8th Cir. 2020); *United States v. Payne*, 964 F.3d 652, 657 (7th Cir. 2020); *United States v. Lavalais*, 960 F.3d 180, 187 (5th Cir. 2020); *United States v. Trujillo*, 960 F.3d 1196, 1207 (10th Cir. 2020); see also *United States v. Watson*, 820 Fed. App'x 397, 400 (6th Cir. 2020) (unpublished disposition). But see *United States v. Gary*, 954 F.3d 194, 206 (4th Cir. 2020). The court agrees with the well-reasoned opinions of these courts and concludes that a Rehaif error does not fall within the limited class of errors the Supreme Court has found to be structural.⁴

Finally, Mitchell argues that *Rehaif* requires the government to prove not only that he knew that he was a convicted felon but also that he knew he was barred from possessing firearms. Notwithstanding the fact that Mitchell admitted to the court that he knew he was barred from possessing a firearm, Mitchell's legal argument is also without merit. *United States v. Singh*, 979 F.3d

⁴ While there is some case law holding that defects in the indictment are structural error, those cases apply only where the claim is timely raised. See, e.g., *United States v. Du Bo*, 186 F.3d 1177, 1179 & 1180 n.3 (9th Cir. 1999) ("We hold that, if properly challenged prior to trial, an indictment's complete failure to recite an essential element of the charged offense is not a minor or technical flaw subject to harmless error analysis, but a fatal flaw requiring dismissal of the indictment. . . . Untimely challenges to the sufficiency of an indictment are reviewed under a more liberal standard."). Mitchell argues that he raised his argument at the earliest possible opportunity and so the timeliness limitation does not apply. The court does not agree. As previously discussed, Mitchell could have challenged the indictment on direct appeal but failed to do so. The claim is not therefore timely raised.

1 697, 727 (9th Cir. 2020) ("[The defendant] contends that *Rehaif*
2 requires the Government to prove he knew not only his status, but
3 also that he knew his status prohibited him from owning a firearm.
4 But this interpretation is not supported by *Rehaif* . . .).

5 Accordingly, because the claims raised in Mitchell's § 2255
6 motion are waived, procedurally defaulted and/or without merit, IT
7 IS THEREFORE ORDERED that the motion to vacate, set aside or
8 correct sentence (ECF No. 30) is hereby DENIED.

9 IT IS FURTHER ORDERED that Mitchell is DENIED a certificate
10 of appealability, as jurists of reason would not find the court's
11 denial of the motion to be debatable or wrong.

12 The Clerk of Court shall enter final judgment accordingly.

13 IT IS SO ORDERED.

14 DATED: This 25th day of January, 2021.

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17 UNITED STATES DISTRICT JUDGE
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